

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>3-3-09</u>
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MARK CLARK

:

Plaintiff,

:

08 Civ. 2206 (GEL) (HBP)

-against-

:

REPORT AND  
RECOMMENDATION

OFFICER NICOLES, et al.,

:

Defendants.

:

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PITMAN, United States Magistrate Judge:

TO THE HONORABLE GERARD E. LYNCH, United States District Judge,

The pro se plaintiff commenced this action on March 5, 2008 by filing a summons and complaint. My review of the file in October, 2008 disclosed that no proof of service of the summons and complaint had ever been filed and it appeared that the summons and complaint had not, in fact, been served. Accordingly, I issued an Order to plaintiff on October 20, 2008 directing that plaintiff show cause on or before December 22, 2008 why the action should not be dismissed for failure to serve the summons and complaint within the 120-day time limit established by Rule 4(m), Fed. R. Civ. P. Specifically, my October 20, 2008 Order provided:

Despite the fact that Rule 4(m), Fed. R. Civ. P., requires that the summons and complaint be served on all defendants no later than 120 days after the commencement of the action, according to the Court's records, the defen-

dant has not yet been served. Accordingly, pursuant to Federal Rule of Civil Procedure 4(m), it is hereby

ORDERED that plaintiff has until December 22, 2008 either to complete service of the summons and complaint on the defendants or to show good cause why such service has not been made. Failure to complete service or to show cause on or before December 22, 2008, will result in the issuance of a Report and Recommendation recommending the dismissal of this action.

(Emphasis in original.)

A copy of my October 20 Order was mailed to plaintiff at the address provided when he commenced this action -- the only address plaintiff ever provided to the Court. It has not been returned as undeliverable.

To date, plaintiff has not filed proof of service, has not explained why service has not been completed and has not contacted my chambers or the Court in any way. Accordingly, I respectfully recommend sua sponte that this action be dismissed on the ground that plaintiff has not completed service of the summons and complaint within the time permitted by Rule 4(m), Fed. R. Civ. P.

#### OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of this Report and Recommendation to file written objections. See also Fed. R. Civ. P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the

Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Gerard E. Lynch, United States District Judge, Room 910, 500 Pearl Street, New York, New York 10007 and to the chambers of the undersigned, Room 750, 500 Pearl Street, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Lynch. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); I.U.E. AFL-CIO Pension Fund v. Hermann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 & n.2 (2d Cir. 1983).

Dated: New York, New York  
February 27, 2009

Respectfully submitted,

  
HENRY PITMAN  
United States Magistrate Judge

Copy mailed to:

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